

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SECURITIES AND EXCHANGE
COMMISSION, .
vs. .
ROBERT J. MUELLER, ET AL, .
PLAINTIFF, .
DEFENDANTS. .
DOCKET NO. 5:21-CV-785-XR

TRANSCRIPT OF PRETRIAL CONFERENCE PROCEEDINGS
BEFORE THE HONORABLE XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE
NOVEMBER 28, 2023

APPEARANCES:
FOR THE PLAINTIFF: CHARLIE L. DIVINE, ESQUIRE
DAVID NASSE, ESQUIRE
KRISTEN M. WARDEN, ESQUIRE
FERNANDO COMPOAMOR, ESQUIRE
US SECURITIES AND EXCHANGE COMMISSION
100 F STREET, NE
WASHINGTON DC 20549-5917

FOR THE DEFENDANT: JASON DAVIS, ESQUIRE
CAROLINE NEWMAN SMALL, ESQUIRE
DAVIS & SANTOS PC
719 S. FORES STREET
SAN ANTONIO TX 78204

REPORTED BY: GIGI SIMCOX, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
SAN ANTONIO, TEXAS

(San Antonio, Texas; November 28, 2023, at 10:00 a.m., in open court.)

THE COURT: 21 Civil 785, SEC versus Mueller.

Who do we have for the government?

MR. DIVINE: Good morning, Your Honor. Charlie Divine. With me at counsel's table are Fernando Campoamor and David Nasse, and behind me at the bench is Kristin Warden.

THE COURT: Thank you.

And for Mr. Mueller?

10 MR. DAVIS: Good morning, Your Honor. Jason Davis is
11 here along with Caroline Small.

THE COURT: Thank you.

13 So we've got a few motions. Let's start with the
14 defendants' motion first, exclude evidence of Mueller's
15 compensation and personal expenses.

16 What's the government's response? I've read your
17 briefs, so you can keep it short.

MR. NASSE: David Nasse.

Good morning, Your Honor.

20 Yes, as set forth in our briefs, Your Honor, the
21 SEC's position is that it's entitled to prove its case with
22 the evidence at bar, and the defense cannot stipulate away
23 evidence.

24 In these expenses, I think if you look at the
25 exhibits, are not overly voluminous. In fact, most of them

1 have been presented via summary evidence, but in fact goes to
2 show -- we have alleged fraud in this case, and the SEC is
3 entitled to show the reason, in part, when Mr. -- our
4 allegation, Mr. Mueller engaged in this fraud, which is, in
5 part, to sustain a certain lifestyle.

6 And to give the jury context beyond just a sort of
7 cold stipulation, I think the courts around the country have
8 said that the government can introduce evidence to that effect
9 to prove why Mr. Mueller engaged in this fraud, and we don't
10 think that these -- as you saw, these exhibits are going to be
11 totally inflammatory or, you know, let the jury draw any sort
12 of improper conclusions based on those exhibits, Your Honor.

13 So based on what we said in the briefs and the strong
14 law, I think, throughout the circuits around this country,
15 Your Honor, we think the SEC should be entitled to present
16 this evidence.

17 THE COURT: Who is responding? Mr. Davis.

18 So the government has to prove in this case scienter,
19 meaning that Mr. Mueller acted with intent to deceive, so why
20 doesn't this come in to establish motive and intent?

21 MR. DAVIS: Your Honor, I think the answer is that if
22 the money was spent on charity by Mr. Mueller or spent at
23 Disney, it is irrelevant to the government's theory of the
24 case.

25 The theory of the case is that he shouldn't have

1 received that money, period. We're stipulating on the amount
2 and what he received. And so there is no other purpose to
3 introduce the evidence of the specific expenditures, whether
4 it be Disney, whether it be an engagement ring or anything
5 else; unless they are willing to stipulate that some
6 expenditures were okay, which I understand they are not.

7 And so, really, just take -- there is no other
8 purpose for introducing that evidence, Your Honor. It doesn't
9 go to showing of fraud any more than if we said every dime
10 that Mr. Mueller received he donated to charitable causes.

11 THE COURT: If I understand your position right, you
12 haven't conceded that this amount of money was used for
13 fraudulent purposes. You haven't done that next step.

14 MR. DAVIS: We believe he was entitled to every
15 penny, but the point is they are saying he was not entitled to
16 those amounts. So, really, their theory, Judge, is that he
17 shouldn't have received that money, end of story. What he did
18 after he received it is irrelevant to their theory.

19 Now, if that's not true, if the nature of the
20 expenditures is important, then they can say so, and then I
21 think we have a different argument.

22 THE COURT: Yeah. No, the overwhelming weight of
23 authority here is that this evidence comes in. Fifth Circuit
24 has said so as well, *Jensen* 41 F.3d, 946.

25 The motion is denied.

1 MR. DAVIS: Yes, Your Honor.

2 THE COURT: So then we now turn to the plaintiff's
3 motion in limine. Let's take these one at a time. The motion
4 to exclude evidence of the viability of the deeproot business.
5 Why don't we just take these one at a time; there's ten.

6 Government.

7 MR. NASSE: Yes, Your Honor.

8 I think this evidence, it's our position, Your Honor,
9 that it doesn't go to any claim in our case. The government
10 has not asserted that Pinball was a bad business plan. We're
11 not putting Mr. Mueller's plan to generate revenue on trial.
12 That's not -- that's not what the nature of our case is. The
13 case is about how he allocated investor funds and was that
14 consistent with the Fund documents.

15 And I just want to address -- you know, we received
16 defendants' papers last evening. A couple points I would put
17 out. The government did not shut down deeproot. The
18 government sued Mr. Mueller and deeproot. Nothing in the
19 SEC's complaint says that he couldn't continue to sell or
20 market Pinball. That's not -- that was not what our case was
21 about.

22 Our case was about what did he do with investor
23 funds. Was it consistent with the fund documents. Whether or
24 not Pinball was potentially viable, potentially profitable,
25 doesn't go to those claims. Those aren't part -- those are

1 not elements of what we're trying -- any of the securities
2 fraud claims we are trying to prove here, Your Honor.

3 THE COURT: So help me understand, though.

4 Deeproot is going to come into play here, right? The
5 jury is going to hear about deeproot, so where is this line
6 that we are drawing here about what they -- what cannot be
7 discussed?

8 MR. NASSE: Yeah. I think we'll find with the
9 background, Your Honor, of deeproot and what the businesses
10 were and what they were intended to do -- again, we are not
11 contesting that this was a bonafide operation that wasn't --
12 it was, in fact, trying to build a pinball machine. That's
13 not part of our case. We don't allege that there's fraud
14 there or that it might have been potentially profitable.

15 That's -- so I think that's the lie. We have no
16 problem with -- or even stipulated to -- what the businesses
17 were and what their potential products were. That's not an
18 issue. And that they were, in fact, operating those
19 facilities. We don't contest that there was a Pinball
20 factory, if you were, or plant or their engineers designed it.
21 That's not contested.

22 We don't contest any of those issues, and we don't
23 think that a deep dive -- if you look at some of the exhibits,
24 a deep dive into the technical aspects of these pinball
25 machines, their marketing plans, the lengthy testimony about

1 what the projections were or how they came up with them,
2 that's just going to confuse the jury about what this case is
3 about and try to make it seem as though the SEC was just
4 trying to shut down this business or doesn't buy -- or make
5 the case about whether Pinball or the other enterprises that
6 Mr. Mueller was funding were potentially viable, when that's
7 not an element of any of the claims we are bringing, Your
8 Honor.

9 THE COURT: The response?

10 MR. DAVIS: Your Honor, given the argument that we
11 just had, this is kind of an interesting position the SEC is
12 taking. I just heard counsel say, "We'll stipulate that
13 Pinball is legitimate;" so, therefore, they can't put on
14 evidence to show that it was legitimate.

15 Now, the response to our motion to keep out
16 individual expenditures was that the SEC needs to be able to
17 prove -- to "show its coherent narrative." That was the
18 language in their response they filed, I think, on our motion
19 in limine. And we are, likewise, entitled to put on our case
20 to show not only the coherent narrative and the background of
21 what happened, but also evidence that goes directly to
22 scienter and intent.

23 And even though the SEC, in response now, is saying
24 this is not part of our case, we are not trying to show that
25 Pinball is not legitimate, if you read the complaint and you

1 read the MSJ that was filed, as we've quoted in our brief,
2 Your Honor, they are talking about whether the deeproot
3 businesses were quote, "suitable investments."

4 They said that Mr. Mueller lied to convince investors
5 that, quote, "the assets would be safe and that they would
6 generate a profit." So the evidence explaining what deeproot
7 is and the Pinball is very relevant.

8 And to be sure, Your Honor, we're not -- I'm not
9 seeking to call an engineer and get into the intricacies of
10 the patents that were purchased for the pinball technology or
11 to get into the details, but the fact of the matter is, there
12 were numerous employees -- I think once exceeding, like, 30.
13 There were patents that were purchased. There were efforts
14 that were going on, to make this a profitable business.

15 And certainly, it's relevant, Judge, because it goes
16 directly to the state of mind that the SEC is alleging against
17 Mr. Mueller when he's talking to investors.

18 THE COURT: Help me understand this. So my
19 understanding is Mueller says to his investors: We're going
20 to be making capital acquisitions in deeproot business.

21 How is any of this capital investments -- or capital
22 acquisitions?

23 MR. DAVIS: Well, Judge, there's a legal response to
24 that, too. There are investments. The money was spent on
25 Pinball. There's a technical argument about whether the

1 nature of those investments were purchasing shares or not.
2 And we'll get into the materiality of that.

3 THE COURT: I think there's twofold, isn't there? So
4 one is the representation that there would be capital
5 acquisitions, and so I'm trying to figure out just what
6 capital was acquired. And then the second part was whether or
7 not the funds received any interest in the deeproot business.
8 And so where is your evidence that the funds got anything out
9 of this Pinball?

10 MR. DAVIS: Well, they would have, Judge.

11 So, for example, you're going to see the testimony,
12 and you'll hear from Mr. Mueller, you'll hear from some of the
13 employees that were directly involved in managing the Pinball
14 operation. There were customer orders, over 125 customer
15 orders for pinball machines. The prototype had been made.

16 You'll hear evidence that during the COVID pandemic,
17 they couldn't get products. They couldn't get equipment, just
18 like every other industry. But when they did start getting
19 it, there were customer orders, and that's why --

20 THE COURT: But that's saying it was a viable
21 business, though. What I'm trying to figure out is how does
22 it make its way back to the -- to the investments that were
23 being sold here?

24 MR. DAVIS: Because part of the theory, the imminence
25 theory, and part of what's in the PPM is that a certain amount

1 of money can be used for ancillary businesses, including
2 Pinball. And so part of the allegations directly from the SEC
3 is that too much money was spent there or it wasn't a safe
4 investment; that it was used to finance Mr. Mueller's kind of
5 dream of a successful pinball business.

6 So how do we counter that other than with evidence of
7 what that was doing? And we're not going to get into, like I
8 said, a voluminous discussion of the technology. But not
9 allowing us to show that Pinball was real, that money did get
10 spent there, that the money was spent on "X," and that there
11 were returns that were expected and, in fact, imminent before
12 the SEC brought this action, or consistent with the
13 representations made to investors. So it's directly relevant,
14 Your Honor, to their theory.

15 THE COURT: Last word to you.

16 MR. NASSE: Just a couple points, Your Honor.

17 The defense has indicated a witness list, that they
18 do intend to call a number of engineers: Chris Rushforth,
19 Sean Gibson, Steve Bowden, Quinn Johnson. Those are all
20 Pinball technical people working, so that's four witnesses.

21 They also want to call Mr. Mueller's bankruptcy
22 counsel who started the bankruptcy to provide testimony about
23 the value of the assets at bankruptcy. So they do intend to
24 get into the weeds, if you will, on the value or viability of
25 the business with the -- and the technical details of the

1 business.

2 I would also point out that the sections of the
3 complaint they point to don't go to the viability of the
4 business. For instance, Mr. Davis mentioned assets would be
5 safe. That's from paragraph 40 of the complaint. That's a
6 paragraph that refers to life insurance policies. Has nothing
7 to do with Pinball.

8 Paragraph 32, that's quoting from the PPM and
9 describing how the PPMs, as Your Honor pointed out, describe
10 the capital acquisitions. It's not about the viability of the
11 business. It's simply laying out the facts of what's in the
12 PPMs, Your Honor.

13 So again, this case is not about what could
14 potentially be profitable. It's about whether Mr. Mueller's
15 actions comported with the text of the PPMs and the other fund
16 documents, Your Honor.

17 THE COURT: Yeah. I'm going to allow some limited
18 testimony about deeproot, but the testimony is going to be
19 limited to what the representations were that Mr. Mueller made
20 regarding deeproot. And then Mr. Mueller can respond to that
21 and talk about the business, but the viability of the
22 business, I still don't understand how that is relevant here.
23 It has little probative value to the allegations in this case.

24 So I'm not going to go -- allow the jury to hear the
25 evidence of the viability of the business, the technical

1 components of the pinball. All of that is not relevant. So
2 that's granted in part, denied in part.

3 If anybody has questions about this ruling as we go
4 on, at trial, we can approach the bench first.

5 That's number two.

6 Moving to -- or number one.

7 Number two, adverse consequences of investigation or
8 verdict.

9 What's the government's position there?

10 MR. NASSE: Your Honor, it's really of a similar vein
11 of the viability.

12 Again, our allegations relate to activities or
13 statements made by Mr. Mueller pre-2021 before the government
14 filed its complaint. And again, the viability or potential
15 viability of this business, the SEC didn't shut down the
16 Pinball or other business. There's nothing that prevented him
17 from doing so. If it was so close to reaping on the precipice
18 of profits, as Mr. Davis stated, he could have done so, you
19 know -- continued to do that right after we filed the
20 complaint.

21 So those don't go to any of the factual bases of our
22 claims, Your Honor. So it's a similar vein; that the SEC
23 caused or shut down deeproot. It's just not factually correct
24 that we did so, Your Honor.

25 THE COURT: And your response?

1 MR. DAVIS: Judge, it's not -- it wasn't entirely
2 clear what they were trying to prevent. It's kind of like if
3 it's a criminal case, obviously, you can't tell the jury what
4 would happen. Like, you can't get into a sentence, for
5 example, or what would be the prospective sentence. So in the
6 sense that it's worded as the "consequences of the verdict,"
7 we're not intending to get into that.

8 Now, what counsel just said is that -- and it kind of
9 goes into, I think, one of other motions in limine, is that
10 you can't talk about what the SEC did in its investigation.
11 You know, the -- prior to filing -- and this is Defense
12 Exhibit 83 -- and I have a copy, Your Honor. I can also pull
13 it up. May I approach?

14 THE COURT: Yes. So before we get into detail, what
15 exactly -- I thought the government was just trying to limine
16 out an argument that the SEC investigation caused the business
17 to fail. Is that your sole point here?

18 MR. NASSE: Yes, Your Honor, that's it.

19 MR. DAVIS: And look, obviously, it wasn't the only
20 cause of failure, but what -- I've provided the Court with a
21 copy of --

22 THE COURT: But why do you want to make that
23 argument?

24 MR. DAVIS: Well, I'll -- we'll tell you, Judge.
25 They are arguing that the investors' money was a

1 complete loss. And they are also arguing -- in fact, you can
2 see from their designation a description of the anticipated
3 testimony of investors about the safety of their investment.
4 And I think it's -- let me quote it so it's accurate: "About
5 the return on the investment, the safety, the ability to repay
6 the suitable investments; that the money would be safe."

7 So the SEC acknowledges that the PPMs say certain
8 monies can be spent on these other businesses. We're going to
9 fight about what -- how to apply the formulas and the numbers
10 in this case. But certainly, they are saying, yes, some of
11 this money could have been spent over here. And they are also
12 making the argument that the investors were duped, among other
13 reasons, because those weren't suitable, and that it wasn't a
14 safe investment.

15 And so the evidence that will be shown will be that,
16 for example, on the Pinball side, there were orders. There
17 was an order that was imminent. When the SEC came in and
18 notified us that they were going to file this case and seek an
19 injunction to freeze all the assets -- it's interesting that
20 counsel just said, "We didn't stop them from operating." When
21 the SEC files an enforcement action and freezed every one of
22 your accounts, the business is done. No one is going to get
23 involved with it. They don't know what to do with it. I
24 mean, that's just reality.

25 So the Exhibit, Defense 38, that I provided to the

1 Court and counsel, was an offer made to the SEC before saying:
2 Well, hold on guys. Come down here. Look at this business.
3 Let us show you what's going on with the Pinball. This thing
4 that was slowed up by COVID is now going. They have
5 prototypes. They have customer orders. They bought IPs so
6 that they can do these machines -- I'm not a pinball expert --
7 Goonies machines and other machines that were apparently very
8 popular.

9 But if you file suit because you've prepared it, all
10 of that is done. In fact, the offer made in Defendants'
11 Exhibit 83 to the SEC was we'll give you a tolling agreement.
12 We'll put a freeze on the account. You can make sure you can
13 see what's going out, if you actually think that Mr. Mueller
14 or anyone else is taking money out of this, but don't do this,
15 because you're going to kill this, and it's going to result in
16 damage and loss to the investors just at the time where this
17 thing is going.

18 That offer was denied. For what reason? For what
19 reason, Judge? You get a tolling argument. You get an
20 agreement: Send down your guys. You can look at the
21 accounts. And it's because, you know, it's the government.
22 They had it prepared. They have a protocol. And I
23 understand, it's not the call made at this level, but it's
24 made at the higher levels, and we need to go file this. We
25 get a press release. Your Honor signs the -- based on the

1 complaint, signs the freeze, and the investors lose
2 everything.

3 So is that the sole cause? Of course not, Judge,
4 because we don't know what would have happened other than we
5 knew that orders were imminent. But it is a relevant fact
6 when they are going to say the investors lost all their money;
7 it wasn't a suitable investment; the expectation of getting a
8 profit wasn't real; it was somehow part of a fraud. It goes
9 directly to Mr. Mueller's scienter and his intent. Directly
10 to it.

11 We're not going to argue, Judge, it's the sole cause,
12 because it wasn't. It was just the final nail in the coffin.

13 THE COURT: So I know your argument here is, well,
14 that's not relevant to the misrepresentation claim, but why
15 isn't it relevant now to a safe investment?

16 You can argue from there.

17 MR. NASSE: That's not our argument. Our claims are
18 not -- I guess if we open that door, we can address that.

19 Our claims are not that we're going to say that these
20 investments were marketed as safe and that investors were told
21 that and that was a misrepresentation. If you look at our
22 claims, they don't -- that's not one of our claims of
23 misrepresentation, that these investments were safe. And
24 they, in fact, weren't.

25 So that's not an element of our claims. Our claims

1 are how we allocated the money. Was it in accordance with
2 those PPMs. And did he use that money in accordance with the
3 PPMs, not whether the investments themselves were safe. So
4 that -- I don't believe that argument is relevant to our
5 claims, Your Honor.

6 And I will say, some investors that testify may say
7 that they thought that was safe, but that's not an element.
8 That's not what we're trying to prove, Your Honor.

9 MR. DAVIS: Your Honor, back to the government's --
10 the SEC's argument about a coherent narrative. If they are
11 willing to stipulate that the Pinball business was viable, it
12 posed a safe investment, then we'll consider that stipulation.

13 THE COURT: But they are saying that that's not even
14 part of their claims.

15 MR. DAVIS: But the problem with that argument,
16 Judge, is what they are trying to do is narrow this case to
17 say, Judge, here's dollars in an account. Here's how it was
18 spent. That's it. The problem with that is that these
19 claims, almost all of them -- there is a negligence claim --
20 these claims require intent and scienter. This information
21 goes directly to that. And --

22 THE COURT: But the scienter goes to what he was
23 saying at the time he said it, right? Or what he represented
24 in writing or verbally, not to what happened with the business
25 and why it stopped operating.

1 MR. DAVIS: But the facts, post-representation, are
2 certainly relevant. Just because they want to get into the
3 facts, why is it relevant that he went to Disney? For the
4 same reason it's relevant that he spent money on a viable
5 business that they are not contesting, I guess, presented a
6 safe investment, but for the closing of the business and the
7 bankruptcy.

8 So we can't get into the mind, Judge, at a time
9 without looking at the circumstances around it on the
10 scienter.

11 THE COURT: So this is a motion in limine, only this
12 is not final evidentiary ruling. Right now -- I mean, I'm
13 looking at the claims of the government, and this is all
14 dealing with the misrepresentations allegedly made, and so any
15 negative effects stemming from the investigation aren't
16 relevant to the representations that were allegedly made
17 regarding the Fund's ownership positions.

18 And so right now I see just prejudice and confusion
19 resulting from going down this sidetrack, but depending on how
20 the arguments are made, you can approach the bench, and I'll
21 reconsider this.

22 MR. DAVIS: Your Honor, does that mean that on the
23 flip side, I anticipate the SEC -- maybe they won't; maybe
24 this will be simple. I anticipate they are going to say that
25 the business failed and that the investors lost their money.

1 Maybe they are not, because under their theory, that wouldn't
2 be relevant either. But if they are, as part of their
3 coherent narrative, then we need to have that discussion now,
4 because otherwise, it's one side without the other, Your
5 Honor.

6 MR. NASSE: Your Honor, I think the parties have
7 stipulated to the fact that these entities went into
8 bankruptcy as a matter of fact, and I think we would be fine
9 with saying that these entities went into bankruptcy.

10 MR. DAVIS: That's not the point, respectfully,
11 Judge. If they are saying that, that means they are intending
12 to offer that fact, that the business failed, which means the
13 jury needs to hear the relevant evidence regarding that.

14 THE COURT: Why -- if this is a misrepresentation
15 claim to the investors, why is that necessary?

16 MR. DAVIS: Well, then the evidence that the business
17 went into bankruptcy or failed, then, would also, under that
18 theory, not be necessary. Because if that's the only
19 government's theory is that there were some statements made at
20 the time that I solicited your investment, and I didn't spend
21 the money as I represented, then they shouldn't be allowed to
22 introduce the fact that the businesses failed or went into
23 bankruptcy.

24 THE COURT: Yeah. The ruling -- this is a grant for
25 now. I'll reconsider this at the time of trial.

1 MR. DAVIS: And then, Judge, on that fact, then, are
2 they going to be allowed to introduce the fact of the
3 bankruptcy or their failure?

4 THE COURT: Well, I heard that you guys stipulated to
5 that. If you are withdrawing the stipulation, then we can
6 consider that at trial.

7 MR. DAVIS: Well, we would be. If that's the order,
8 if we're not going to be allowed to explain why the company
9 went into bankruptcy or the circumstances around that, then
10 certainly, we would -- you know, I'll confer with counsel, but
11 that shouldn't be a stipulated fact if we can't get into the
12 facts around that.

13 THE COURT: You guys know this case much better than
14 I do, but, I mean, it would seem to be -- the fact that these
15 businesses failed would actually inure some sympathy to your
16 client, because otherwise they would be left with the
17 impression that it's an ongoing business. If it's an ongoing
18 business, what's he doing with three marriages being paid for
19 with investor funds?

20 But it's your case. I mean, that's the initial
21 thought that's waving over my head.

22 MR. DAVIS: And that's why the motion in limine on
23 that was so important, Judge, the fact that those were the
24 issues of importance to the Court -- and by the way, it wasn't
25 quite accurate, but I get the point. If there are multiple

1 marriages or divorces spent on the money, completely
2 inflammatory and irrelevant, because the government's theory
3 is he shouldn't have had that money. It should be the same
4 whether he took that money down to the Food Bank and gave it
5 all to the Food Bank.

6 But that's precisely why, Judge, even you, with your
7 extensive experience there, having to call balls and strikes,
8 if it's sticking in your mind, what's it going to do to a jury
9 here when that's not part of the government's theory,
10 according to them?

11 THE COURT: But it is relevant to the scienter, so
12 that's the difference here. That's the ruling.

13 Moving on to three. Advice of counsel. So -- why
14 don't you just stay there.

15 So help me understand how your client told counsel
16 everything -- outside counsel everything they needed to know
17 and that they provided a legal opinion that he relied on.

18 MR. DAVIS: Judge, I'd like to first talk about the
19 first point that you raised, which is the full disclosure
20 issue. And, you know, one of the cases cited by the SEC,
21 the -- it's kind of difficult -- I think it's *Impastato*.

22 I'll get the spelling later.

23 THE COURT: I-M-P-A-S-T-A-T-O.

24 MR. DAVIS: Yes, Your Honor. I think it was a
25 Louisiana case. But basically recognized -- and I think the

1 *Snyder* case, too, recognized that that's a jury question; that
2 the level of disclosure, whether it was full disclosure or
3 not, should be submitted to the jury.

4 So this is not appropriate for a motion in limine
5 saying you can't get into that. So that's the threshold
6 issue. In fact, we cited directly that court's discussion of
7 that, and I think the *Snyder* case just reinforces that. And
8 that was a large part.

9 THE COURT: But, I mean, there's got to be enough
10 fact issues to go to a jury. So tell me where are there fact
11 issues that may go to a jury on this?

12 MR. DAVIS: Sure, Judge. I guess we'll put it into
13 context.

14 If you read the SEC's motion, it creates the
15 impression that Robert Mueller went to these lawyers, the
16 securities lawyers, just prior to the PPM and said, "Hey,
17 guys, I'm going to raise some money." That's not what this
18 was.

19 What you had was over two and a half years of
20 representation -- actually, two years and five months -- by
21 these lawyers prior to that PPM that's the subject of this
22 case, the first PPM. That's the real subject of this case.
23 There are several, but that's the in-time.

24 So this argument, number one, that there wasn't full
25 disclosure and that the lawyers weren't familiar with the

1 business is belied by the extensive experience and
2 representation that they had these entities and Mr. Mueller,
3 number one.

4 By "extensive," hundreds of thousands of dollars
5 worth of legal bills and hours. Mr. Concilla described, Your
6 Honor -- I think as he said, "We talked all the time." We had
7 emails and phone calls all the time, consistent with
8 Mr. Mueller's testimony.

9 So this notion that they weren't fully aware, having
10 set up this structure for the business themselves, is just
11 belied by the facts. So that description, Your Honor --
12 obviously, we didn't question our own witness, Mr. Mueller,
13 during his deposition, but you will hear testimony, and you
14 see glimpses of it, even through the SEC questions of
15 Mr. Mueller in his deposition about extensive and thorough
16 discussions with his lawyers at all stages two and a half
17 years leading up to the PPM.

18 Now, what they point to is Mr. Concilla's statements
19 during his deposition that he couldn't recall certain things;
20 that he does say there are lots of discussions. We were
21 talking -- I think he almost said -- every day during the
22 critical time.

23 Mr. Concilla was hospitalized, Your Honor, for a
24 large period of time. We had to set up his deposition, you
25 know, working around that. He was ill. There was a serious

1 illness. In fact, that's one of the reasons why we've agreed
2 if he has to testify, to do it remotely at his request.

3 He's admitted candidly that he doesn't recall things.
4 He's also admitted candidly that he wouldn't dispute if
5 Mr. Mueller did recall things that he couldn't recall.

6 So -- but what we do have -- and that's why we cited
7 so many clips -- is we have both Mr. Mueller and Mr. Concilla
8 in their testimony -- and you'll hear more from Mr. Mueller --
9 talked about the extensive discussions and advice into
10 different areas leading up to the PPMs, which are the
11 representations that are at issue in this case.

12 THE COURT: There was no, like, warranty letter or
13 letter provided by counsel as to the parameters of the
14 disclosures? Nothing like that?

15 MR. DAVIS: Not as to the -- you mean as to the scope
16 of representation or as to the disclosure?

17 THE COURT: No, to the scope of, "this is to affirm
18 that the following disclosures were made." I mean, the stuff
19 you would normally see a lawyer recap.

20 MR. DAVIS: You know, I guess look at it from this
21 perspective, Judge. You have Mr. Mueller going to these guys
22 who are undisputedly veteran. I mean, the guy has 40 years.
23 In all these offerings, I think the Court may have seen his
24 resume in connection with some of the disclosures as a
25 nonretained expert.

1 So what can Mr. Mueller do as a client but go to
2 these folks and pay them top dollar, pay hundreds of thousands
3 of dollars, and spend -- who knows? -- thousands of billable
4 hours getting advice from them.

5 So if there aren't documents like that that other
6 securities lawyers give, it shouldn't be on Mr. Mueller. Why
7 is that important? It's important because Mr. Concilla, in
8 his deposition, answered the following questions: "When you
9 said 'We're done, I approve this,' did you mean that you
10 approved all the disclosures and that this was acceptable and
11 in compliance to give to investors?"

12 "Yes."

13 Over and over and over again. And in terms of the
14 challenges, Judge, you know, when you look at the case law,
15 the relevance issue is, well, our -- was the advice related to
16 the issues that are at issue in this case? And that's why we
17 cited so many excerpts, because both Mr. Mueller and
18 Mr. Concilla describe the areas that are of concern in this
19 case.

20 For example, loans and compensation. "Yes."

21 "Critically, when you blessed the PPMs, did you know
22 that there was no revenue; in other words, that investor money
23 was going to come in at a time when you knew that investor
24 money or that company money was going to be paying these?"

25 "Yes, we knew that."

1 Now, Mr. Concilla said, "I don't recall a specific
2 conversation about investor money being used to pay other
3 investors," but he says, "If I had been asked, yes, I believe
4 money is fungible, as long as there's money from other
5 sources," which there was.

6 You will hear, Judge, that there was money from other
7 sources in these accounts. There were both loans, and I think
8 one or two of the policies had paid off. Then Mr. Concilla
9 says there is nothing wrong with that. Money is fungible.

10 Mr. Mueller certainly will testify, he remembers
11 those conversations in the context of this, and that was
12 precisely why he proceeded and relied upon Mr. Concilla and
13 the law firm.

14 So back to the Court's question, was there
15 disclosure? You have two and a half years of evidence that
16 will be uncontested of an attorney/client relationship
17 specifically with these companies, the predecessors, going
18 forward, that shows that these lawyers were very familiar with
19 this operation and the structure. They set it up.

20 You have the testimony from Mr. Mueller and
21 Mr. Concilla talking about the various different topics, and
22 you have Mr. Mueller saying, "Yes, I relied upon them. Yes, I
23 had these conversations."

24 If you read the SEC's brief, Judge, you think that
25 specific conversations about these different areas that are at

1 issue never happened. We've given you sworn testimony of
2 Mr. Mueller, even not in response to our questioning -- to
3 their questioning -- talking specifically that he did get such
4 advice.

5 That is the evidence that is necessary. If they have
6 a challenge about the extent of that, then that is for the
7 jury to decide. They can argue to the jury, well, they didn't
8 tell them this. They didn't tell them that. But there's
9 certainly enough evidence, Your Honor, to justify that issue
10 being at play in this case.

11 THE COURT: So -- to the government.

12 So defendant says that they have provided some amount
13 of information that should potentially be heard by the jury.
14 I mean, why shouldn't I go on the safe side, allow them to do
15 what they are going to attempt to do?

16 Mueller says whatever he's going to say, the attorney
17 or attorneys -- plural -- say what they are going to say, then
18 I decide whether or not the reliance on counsel argument can
19 go to the jury. Perhaps, if you guys are correct, and it's
20 not met, then I don't provide such an instruction, and I tell
21 the jury to disregard all the evidence they previously heard
22 on this point. Why isn't that the safer route?

23 MR. NASSE: Yes, Your Honor, I think it's exactly for
24 the point you raised at the outset. There needs to be some
25 modicum of facts behind some of these assertions of privilege.

1 And you -- at our last hearing, Your Honor, you
2 specifically asked the defense counsel to provide you specific
3 examples of where the lawyers were provided -- asked a
4 specific question with the appropriate information and what
5 their response was.

6 And here in the motion, you have, I think, ten to
7 twelve pages of citations to the attorneys' depositions. And
8 not a single one of them, if you look at them closely,
9 indicate that there was a specific question asked about the
10 issues in this case, the information they provided.

11 In fact, to the very issue where Mr. Davis just
12 raised about Ponzi payments, the question they cited, where he
13 says "money is fungible," but the entire quote is, "So
14 wherever this money is coming from or if it's going into an
15 account, it could be used for whatever purpose. But did we
16 have a specific discussion of what I think you are asking,
17 paying all investors with new investors' money? We did not."

18 So it's not that we didn't recall or some sort of a
19 vague answer. It's "We did not."

20 THE COURT: What did Mr. Mueller say in his
21 affidavit?

22 MR. NASSE: Mr. Mueller -- if you look at their
23 statements, are vague assertions. We don't dispute that
24 Carlile Patchen provided advice of the drafting of the initial
25 documents. We're not saying that there are some technical --

1 THE COURT: That's not going to get them there.

2 MR. NASSE: Yeah. That's the -- and I think the case
3 law is clear on that. It's what did they know after the fact,
4 after those funds launched, his -- what his conduct was in
5 relation -- in light of the representations in the PPMs.

6 His assertions are we had discussion -- our vague
7 sort of statements of, we had discussions all the time. We
8 talked about everything, but the very -- the citation that
9 Mr. Davis mentioned about the loans, if you look at that
10 entire transcript, you see me going repeatedly, like, asking
11 Mr. Mueller: "Do you recall a specific conversation?"

12 "Well, we talked about everything. We talked about
13 all kinds of -- we must have talked about it."

14 Those are his types of responses; whereas the
15 lawyers, when they are deposed, are very definitive and say,
16 "No, we did not," on all the core issues; whether there was a
17 legally enforceable interest in the life policies or the
18 affiliated business.

19 As you pointed out, what does capital acquisition
20 mean? In fact, their testimony was exactly contrary to that.
21 They expected there to be a legally enforceable interest in
22 the entities that the funds were investing in. In fact, they
23 said if they had known that there wasn't, they would have
24 advised Mr. Mueller to amend the PPMs.

25 Whether he could use personal -- use investor funds

1 for personal expenses. There is no citation in any of their
2 documents where -- that he provided -- asked that question
3 specifically to Carlile Patchen and they provided any
4 guidance.

5 Whether he could use -- they just cited -- pay
6 returns to other investors with new investor money, whether he
7 could use the company advance to pay those investors. They
8 have views about what the document said, but at every
9 opportunity, they always said they didn't have those specific
10 conversations with Mr. Mueller.

11 So our view is in light of the fact that there's not
12 a factual basis to introduce the supposed advice of counsel,
13 the prejudice, Your Honor, outweighs the relevancy here.

14 THE COURT: So Mr. Davis, you are telling me that
15 in -- and I can't pronounce the lawyer's name, and then your
16 client's affidavit, those are the two places that you believe
17 allow you to raise this to the jury. Is there any other
18 places that you think support?

19 MR. DAVIS: Well, it's our client's testimony, Judge,
20 from his deposition from the SEC, and it's what we anticipate
21 he will testify to. I want to slow this down, because there
22 are statements being made -- or if you just look, Your Honor,
23 at what we have filed, there are some examples in there.

24 So, for example: "Did Carlile Patchen" -- that's the
25 law firm where Mr. Concilla was -- "ever advise you that it

1 was permissible to pay existing investors with new investor
2 investments?"

3 "Answer: Yes."

4 "Question: When did that occur?"

5 "Answer: It occurred continuously throughout the
6 representation, including after there was a privilege waiver
7 date."

8 "Question: Did you have a conversation where Carlile
9 Patchen advised you it was permissible?"

10 "Answer: Yes. We had many conversations."

11 And he was adamant -- Mr. Concilla -- this is
12 Mr. Mueller talking about Mr. Concilla.

13 THE COURT: You are citing from your client's --

14 MR. DAVIS: Deposition answers that are sworn, that
15 are part of our response. Dennis was adamant about the
16 provision that money was fungible. That's exactly what
17 Mr. Concilla testified to.

18 Now, Mr. Concilla testified -- just as I said and as
19 counsel said -- we didn't have those conversations. But when
20 asked by Mr. Hulings in the deposition, he said, "You know,
21 we're talking about eight years ago." He said, "Yes, it may
22 have. Mr. Mueller could have a different recollection."

23 But Mr. Concilla says, "I know what I would have
24 said," which is exactly how Mr. Mueller describes it; that
25 money is fungible. It's not a Ponzi scheme if there are other

1 monies in the account.

2 Here's another example. Again, sworn testimony from
3 our client. This was the SEC asking Mr. Mueller.

4 "Question: Did you ask Carlisle Patchen whether you
5 should disclose that you would pay existing investors with new
6 investor funds?"

7 "Answer" -- not vague, not equivocal -- "Yes. We
8 talked about it several times."

9 The company advance section and the language therein
10 was their response to these types of discussions.

11 So we cited Mr. Concilla's testimony. When
12 Mr. Hulings asked Mr. Concilla, "Do you think that the company
13 advance section could be used to pay investors?"

14 "Answer: Yes. That could be proper."

15 So is there evidence, Your Honor, that supports this?
16 Yes. And I could keep going. For example, Mr. Concilla was
17 asked -- it said:

18 "Question: You don't recall discussions with
19 Mr. Mueller regarding placing 30 percent of investor funds
20 into deeproot Pinball?"

21 Mr. Concilla said: "I do recall."

22 And they said: "What did he tell you about that?"

23 He said, "He thought it would allow some
24 diversification of cash flow."

25 This is Mr. Concilla.

1 THE COURT: But where is that evidence that the
2 lawyer is actually providing him advice?

3 MR. DAVIS: Because those conversations, Judge, are
4 part of his advice and approval, which is what I'm getting to,
5 the culmination of that, which is, yes, these PPMs, with my
6 knowledge, based upon these discussions, are good to go. They
7 are compliant with the securities laws, and may be presented
8 to investors.

9 THE COURT: And there was no written memorialization
10 of any of this?

11 MR. DAVIS: There's sworn testimony from
12 Mr. Concilla, Judge.

13 So let me give you --

14 THE COURT: No. I'm still wrapping my head around
15 this complex deal being put together by Carlisle Patchen and
16 there is no formal letter blessing this.

17 MR. DAVIS: Well, that may be a mal -- well, there's
18 a tolling agreement. That may be a malpractice issue, Judge,
19 but we don't have to guess now, because what Mr. Concilla
20 remembers is, quote, "Did you provide legal advice with
21 respect to the PPMs?"

22 "Yes."

23 THE COURT: But there's no doubt about that. The
24 question is what the representations were and did he bless the
25 representations being made.

1 MR. DAVIS: Right, Judge, but the representations
2 were in the PPM. Their point is that, well, he did -- the way
3 it was actually set up, the way that it was working was
4 inconsistent.

5 What this evidence, the sworn testimony, shows is
6 that Mr. Concilla and his firm were very familiar with the
7 structure and the setup, were very familiar with that. And so
8 when you have Mr. Mueller, who obviously remembers -- he's on
9 trial here. You have a securities lawyer, a 40-year veteran,
10 who has been through a health crisis and isn't well enough to
11 come to -- live here, asked to remember one of many, many
12 clients' conversations eight years ago and says, "Yes,
13 Mr. Mueller, I wouldn't doubt that he would remember this
14 stuff" -- basically -- "better than me."

15 THE COURT: So we keep talking about one lawyer. I
16 thought you guys were going to have more than one lawyer.

17 MR. DAVIS: There is two. They're both from the same
18 firm. Mr. Concilla was the lead lawyer. There's a
19 Mr. Federico. Honestly, I think Mr. Concilla was the lead
20 lawyer, and he's probably the one we would call.

21 THE COURT: No, I'm talking about them.

22 MR. DAVIS: Oh, them.

23 THE COURT: Yes.

24 MR. NASSE: Yes, that's right, Your Honor. There is
25 another lawyer, Mr. Federico. Same firm. He testified in his

1 deposition that he didn't advise Mr. Mueller on either PPM, so
2 that was his testimony. He did advise him on other funds, but
3 not these two PPMs.

4 *(Off-the-record discussion.)*

5 MR. DAVIS: I was going to say, Judge -- I mean
6 again, we're getting to whether the Court should go down the
7 safe route, and the U.S. versus -- or the SEC versus *Snyder*
8 case actually goes directly to what you've said, Judge, which
9 is why isn't it safer to listen to this and then make that
10 decision.

11 In that case, the Fifth Circuit observed that, quote,
12 "The defendant does not have the burden of proving any, quote,
13 'elements' of the defense before the jury can weigh the
14 defendant's theory of reliance."

15 And to deprive -- given the testimony, the sworn
16 testimony already from Mr. Concilla and Mr. Mueller, to
17 deprive Mr. Mueller of putting this information before the
18 jury -- and at the end of this case, Your Honor, you can
19 decide whether -- whatever decisions you want to make in terms
20 of what written instruction, if any, get provided, not only is
21 it the safe route, it's the route that's dictated by the Fifth
22 Circuit and in fairness in this case.

23 When Mr. Concilla stated, "your opinion that you
24 communicated to Mr. Mueller" -- this is an example, Judge --
25 "was that the PPMs for the 575 Fund and the GRD Fund

1 adequately disclosed that he would be receiving compensation
2 in some form."

3 He said implicitly, yes. He said, "I don't" --
4 again, it doesn't speak to it specifically, but implicitly,
5 yes.

6 So, again, we go back to where we started, which was
7 we're going to talk about these expenditures. Mr. Mueller
8 shouldn't have gotten that money. Kind of a strange theory.
9 He shouldn't have been compensated. And here is direct
10 testimony from Mr. Concilla, said, of course, you know, my
11 advice included that area.

12 THE COURT: What about the alternative argument that,
13 well, you invoke the attorney-client privilege at various
14 times during the deposition of this Concilla?

15 MR. DAVIS: I'm glad that there is argument. That
16 the waiver -- there was a waiver that was given. And I think
17 we can all agree that a waiver -- you don't have to give up
18 all of your attorney-client relationship in order to meet the
19 burden of the reliance, so there was no assertion of privilege
20 on anything that was covered by this area on the reliance.

21 And so -- and if there was an issue -- and that's why
22 reading this deposition -- Mr. Hulings did the deposition from
23 our side. If there was an issue, the record is complete with
24 Mr. Hulings taking a break, coming back after conferring with
25 Mr. Mueller, and say, okay, this would be within the scope.

1 You can answer.

2 So some of the examples of what Your Honor is
3 mentioning was actually before that happened, Mr. Mueller
4 reentered and answered some of those questions. Some he
5 didn't. So, for example, there wasn't a waiver on post-2019
6 discussions, because that's not relevant to their claims or
7 defenses. There wasn't a waiver on the SEC investigation.
8 That's not relevant -- I think we can all agree -- to their
9 claims or defenses.

10 So the waiver of attorney-client privilege was even
11 broader than necessary to match these issues on this advice.
12 And if they didn't agree with anything of that; for example --
13 I don't recall, because I wasn't there. I think Mr. Nasse may
14 have been in those depositions with Mr. Mueller. There was a
15 discussion -- because I've read the transcript a few times --
16 there was a discussion between Mr. Hulings and Mr. Nasse where
17 they said, well, we disagree with this exertion of privilege.
18 We'll take that up with the Court.

19 That never happened. So if there was a dispute about
20 the scope of privilege or the -- or that then it could have
21 been taken up, but on a motion in limine to say King's X, even
22 though I've got sworn testimony from Mueller and Concilla and
23 I've got a waiver, you can't put any of that evidence on,
24 Judge, would just not, in our view, be an appropriate result.

25 THE COURT: What about the accountants? Are you

1 going to try to argue that accountants gave some kind of
2 accounting advice that's relevant here?

3 MR. DAVIS: Well, we are, depending upon their
4 theory. Again, the SEC has kind of molded their theory, and
5 now it's more limited. So I don't know if they are going to
6 get into the fact of how Mr. Mueller received compensation, or
7 what's noncompensation or loan proceeds. If they are, then we
8 need to show that he was advised to book it that way by
9 accountants. If they are not, then we don't need to.

10 So if that comes up, Judge, if they say,
11 "Mr. Mueller, why was this booked as a loan or AR?" Then I
12 think it's undisputed that the accountants provided him that
13 advice to do that, and he testified to it.

14 If they are not going to get into that, then I don't
15 think we need the accountants.

16 THE COURT: But I thought they testified that they
17 never provided any kind of tax or other advice concerning
18 compliance of security laws. Is that true or not?

19 MR. DAVIS: That may be true, but that's not the
20 point on the money coming out. What they did do is prepare
21 the tax returns. And what they did do is prepare those tax
22 returns consistent with how Mr. Mueller received these funds.
23 He didn't prepare the tax returns.

24 So the securities laws, we are not going to ask an
25 accountant to talk about securities laws. But if they're

1 getting into, "Hey, why did you take -- why was this booked as
2 a loan as opposed to W-2 comp or something else" --

3 THE COURT: Well, I'm confused. Why does that all
4 come into this case?

5 MR. DAVIS: I don't think it should.

6 THE COURT: What's the government say?

7 MR. NASSE: Yeah, I don't think that's our position.

8 It was our view that, based on some of their witness
9 designations, Your Honor, that they were going to say, well,
10 the accountant said it was a loan; therefore, it was
11 permissible. And our claim is that it may have been
12 permissible under the tax code, but it wasn't done necessarily
13 in accordance with the PPM and the disclosures to investors.

14 Introducing that evidence of an accountant is undue
15 privilege that will tell -- you know, indicate to the jury
16 that there was some advice maybe that related to securities
17 compliance, because it's a professional, and we just think
18 that's an undue prejudice, given the fact that the actual is
19 relevant.

20 THE COURT: Respond to that.

21 MR. DAVIS: Yes. I don't think we are going to offer
22 testimony of an accountant to say that loans were consistent
23 with securities laws or the PPM. So that's not -- I think
24 we're missing each other there. We'd like to keep them on
25 board, because if they go forward and say, well, you received

1 your compensation based on the tax laws in a different way,
2 then that's why we would call them. It sounds like they are
3 not planning on doing that, so maybe we just saved half a day
4 of trial.

5 MR. NASSE: The only concern with that, Your Honor, I
6 think is if Mr. Mueller gets up and testifies and says, Well,
7 I ran this by my accountant, and they said it was -- you
8 know --

9 THE COURT: Yes.

10 MR. NASSE: -- appropriate.

11 THE COURT: The ruling right now on that one, on
12 reliance of accountant -- that's the motion in limine by the
13 government -- is granted.

14 Now, let's go back to the attorneys. I'm really
15 wrestling with this. I'm concerned that if I deny it at this
16 stage -- and again, this is just a motion in limine. So it's
17 not -- but I think I need to provide you enough guidance as to
18 how we're going to go forward in trial.

19 This is a very close call, and since it's such a
20 close call, I'll allow the lawyers to come up and then
21 Mr. Mueller to come up and say what they have to say, and
22 we'll see whether it's enough to get a jury instruction. And
23 if it's not, the risk from the defendants' perspective is I'll
24 also instruct the jury to disregard all the evidence that they
25 heard on that point.

1 MR. DAVIS: And Judge, we'll -- we understand the
2 Court's ruling. We'll take that up at the time. There is
3 some case law that says, look, even if you don't get the
4 instruction, it can go towards your state of mind and good
5 faith, but we'll take that up at the time, Judge.

6 In terms of the instruction not to consider, I don't
7 think we have to get into that now, but at that time, Judge,
8 we'll reserve our right to show you some authority on that
9 point.

10 THE COURT: I got it. Thank you.

11 Number five, undisclosed opinion testimony. Is there
12 any such?

13 MR. DAVIS: I'm going to let Ms. Small address that
14 one, Your Honor, with the Court's permission.

15 MS. SMALL: Good morning, Your Honor. Caroline Small
16 for the defendant.

17 To your point, there is no undisclosed expert
18 testimony. We timely disclosed our four nonretained experts
19 on April 6th. There's been no --

20 THE COURT: So this motion in limine is only talking
21 about Craig Rushford [sic], I believe, right?

22 MS. SMALL: He was disclosed, Your Honor, on
23 April 6th. They took his deposition two months later in June.
24 So he has been disclosed. There was never any *Daubert*
25 challenge or any pretrial motion on these folks regarding the

1 sufficiency of the disclosures, regarding their
2 qualifications, regarding anything. So the timeliness of the
3 challenge to the kind of sufficiency of their disclosures, the
4 nature and scope of their expertise, their qualifications,
5 that door is closed.

6 THE COURT: And what is he going to talk about? He's
7 a facility engineer?

8 MS. SMALL: So all four disclosures, Your Honor, it
9 was Mr. Rushforth, the two lawyers we've just discussed, and
10 Mr. Mueller. Really, this was a conservative approach we took
11 that said, hey, these guys are fact witnesses, right? They
12 were on the ground. Everybody understands and agrees that
13 they have relevant, factual testimony.

14 But some of the things they are going to talk about
15 could be construed as having kind of technical expertise under
16 Rule 702. So just out of an abundance of caution -- and our
17 disclosures say this -- to the extent that any of their
18 testimony can be construed as having any technical expertise
19 under 702, we are letting you know now that they might offer
20 testimony on those areas.

21 And so it really is -- it's not a typical kind of we
22 are offering them -- we are not going to be offering them for
23 opinions about, you know, the SEC Regs or anything like that.
24 But just out of an abundance of caution, if they are going to
25 offer any kind of technical expertise -- just outside of what

1 the jury might understand. Hey, this is the process of when
2 you raise money for a start-up company. Or the lawyers, this
3 is the process you go through when you are vetting PPMs or
4 Mr. Mueller, you know --

5 THE COURT: What's a facility engineer do?

6 MS. SMALL: Mr. Rushforth can talk about deeproot
7 Pinball. We understand the Court's instruction on motion in
8 limine -- the government's motion in limine, number one.

9 But just to the extent that he's on the stand and
10 saying, yes, we were ordering patents. We were doing these
11 things in the warehouse. We were building things, we
12 didn't -- we wanted to prophylactically address any objection
13 that says wait a minute, now he's talking about the design of
14 pinball, and this gets into expertise we didn't know about.

15 It was really just a cautionary measure to put the
16 government on alert that there might be some, I'll call it
17 "scientific," but sort of technical testimony that these fact
18 witnesses may be offering.

19 It's all going to be based, all four of them, on
20 their perception under Rule 701, but just out of abundance of
21 caution, we wanted to disclose them as potential experts,
22 which was timely done, as I mentioned, back in April. All of
23 these witnesses were deposed after those disclosures, with the
24 exception of Mr. Mueller.

25 And again, there's been no challenge from the

1 government under the Court's scheduling order -- I believe
2 that deadline passed in August -- to file any challenge to any
3 expert, retained or unretained.

4 So to the government's motion in limine, any
5 undisclosed expert testimony, we're not going into. We agree
6 that we will be limited by the disclosures that were timely
7 served in April.

8 We will stick to the strict letter and scope of those
9 disclosures, which were fulsome. They were not cursory, as in
10 the cases that the government cited that you authored -- one
11 of them -- where it was just kind of see medical records, and
12 it was 29 doctors. That's not the case here.

13 These are four fact witnesses that the government has
14 known about. They were all deposed. There is fulsome
15 disclosure about the scope of their testimony. It's not just,
16 hey, go see a thousand documents. And, really, Your Honor,
17 it's just a precautionary measure.

18 So I don't think we are really arguing over anything.
19 We don't intend to go outside of the scope of the disclosures
20 that have been made, so with that, I'm not sure --

21 THE COURT: But given my earlier ruling, Rushforth
22 doesn't even come in, does he?

23 MS. SMALL: He may come in, because he was on the
24 ground, and he will have -- he was there at the time. He was
25 there at the time that the disclosures were being made. He

1 was a fact witness. He was observing Mr. Mueller, and he may
2 have evidence that, given the Court's first ruling, may not go
3 so much to the technical area. That may be moot, Your Honor.
4 It depends how the testimony plays out. And as Mr. Divine
5 said, we have to hear the context of the story, right?

6 So it will depend. I would like to reserve the right
7 to see how the testimony plays out. But he was also a fact
8 witness on the ground observing Mr. Mueller and observing
9 representations that were going on, so to that extent, he may
10 have knowledge about the circumstances surrounding the
11 disclosures made at the time, which is certainly relevant to
12 the scienter.

13 THE COURT: Government's response?

14 MR. CAMPOAMOR: Thank you, Your Honor. Fernando
15 Campoamor for the SEC.

16 Your Honor, just to be clear, the motion that we
17 filed did not pertain to all four witnesses. It was just only
18 to Mr. Rushforth and to Mr. Mueller himself.

19 As to Mr. Rushforth, in light of the Court's ruling,
20 we don't understand how his testimony would come in at all,
21 because he very clearly testified at his deposition that he
22 had no knowledge at all about the PPMs or representation to
23 investors or any of the sort. So I don't understand what has
24 just been argued to the Court about how his testimony is
25 relevant.

1 Now, as to Mr. Mueller, there's a couple of things
2 here that we highlighted in the motion and that were not
3 addressed in the response that was filed late afternoon
4 yesterday, late afternoon. And that is, by the time we got
5 those disclosures from Mr. Mueller, he had already been
6 deposed. So we never -- the government never had the chance
7 to sort of try to even explore this so-called fulsome
8 disclosures, and respectfully, we disagree.

9 The disclosures were so general, as Mr. Mueller
10 reserves himself the right to respond to any expert testimony.
11 So, for example, we don't know if Mr. Mueller is going to try
12 to respond to our expert, Bill Post, or what he's going to say
13 about Mr. Post's expert opinions. We have no idea what he's
14 going to say about that.

15 So there is case law, as this Court ruled, in that
16 *Knighton versus Lawrence* case, that is very specific that the
17 other side needs to say what the actual opinions are and what
18 the basis is. And of course, we're not going to object to
19 fact testimony about, I was here on this day or I did this or
20 I ordered or I even applied for a patent. But to the extent
21 that they want to provide opinion testimony, that was not
22 disclosed.

23 And something that was not addressed is we did send a
24 letter to the defense back in June before the deadline that
25 says, Please, these disclosures are deficient. Can you please

1 tell us what it is that they are going to say, and they did
2 not respond.

3 So as to the *Daubert* deadline, all I can say is this
4 was not technical testimony or we are not going to challenge
5 their credibility or credentials, but now that we are headed
6 for trial, we need to know what they are going to say, and
7 they haven't said. So we do not believe that they should be
8 allowed to provide opinion testimony. And in Mr. Rushforth's
9 case, we don't even know how he's relevant.

10 THE COURT: So with regard to Mr. Rushforth -- this
11 limine number five -- no expert testimony will be allowed by
12 him. I also question how he's going to have any factual
13 testimony that he can provide, but -- you can try, but I'll
14 allow the government to take him up on voir dire when he takes
15 the witness stand, and if he says what the government says
16 he's going to say, I don't know how he's going to have any
17 relevant testimony to offer here, even as a fact witness.

18 Now, with regard to Mr. Mueller. So I'm hearing that
19 he never provided a letter indicating what specific areas of
20 the law he would be testifying in as an expert.

21 What's the response to that?

22 MS. SMALL: I do have our expert designations, Your
23 Honor. May I approach?

24 THE COURT: Yes.

25 MS. SMALL: For the record, this is also on file at

1 Docket 130-14. I'll hand a copy to you.

2 THE COURT: So these were filed 13 days ago?

3 MS. SMALL: No, no, no. I'm sorry, Your Honor. This
4 was an exhibit that was filed 13 days ago. These were
5 actually served April 6th, which is the deadline in the
6 scheduling order.

7 Now, April 6th was three months after they had
8 deposed Mr. Mueller, but there were still three months left in
9 discovery, okay? So they chose to depose Robert -- I mean, I
10 wasn't involved. I can't speak to the scheduling, but they
11 chose to depose Robert before the expert deadline. That's
12 fine.

13 And then they get disclosure saying, okay, hey, just
14 out of an abundance of caution, Mr. Mueller might offer
15 testimony that could be considered expert under 702. They get
16 that disclosure in April.

17 They have all of April, all of May, all of June, and
18 half of July to raise an issue with the Court about
19 Mr. Mueller's designation. They do not. They have all of
20 those months to say, hey, wait a minute. We need to go back
21 and depose him on this now that you have designated us. They
22 never made that request to counsel. They never made that
23 request to the Court.

24 And so, really, this is kind of too little, too late,
25 Your Honor. The disclosures were timely made. They are

1 sufficient. It's really out of an abundance of caution. If
2 they wanted to know, hey, how are you going to respond to our
3 expert Bill Post, they needed to confer with us or pursue that
4 with the Court, and they did neither.

5 THE COURT: Last word to you-all.

6 MR. CAMPOAMOR: Yes, Your Honor.

7 For example, this is the extent of the disclosure.
8 "Mr. Mueller may also testify regarding the opinions offered
9 by other experts designated in this case." That's the extent
10 of it.

11 And we did actually include, which is -- we did
12 include the disclosures from them, which was P33 for our
13 motion, but as Exhibit 7 to our motions in limine, we also
14 included our June 7, 2023, letter where we asked defense
15 counsel to please provide the actual disclosures that are
16 called for by the rule for nonretained experts. They did not
17 respond.

18 So it was their election not to provide that, and so
19 now that we're getting ready for trial, we just wanted to
20 raise it for the Court. No, they have not raised -- they have
21 not provided us the opinions. They have not provided us the
22 basis. They should not be allowed to provide opinion
23 testimony. We are not objecting to them being fact witnesses,
24 but opinion testimony should not be allowed.

25 THE COURT: Yeah. So I am looking at -- pages 3 and

1 4 are discussing Mr. Mueller. Where is he giving us a summary
2 of the facts and opinions as to which he's expecting to
3 testify?

4 MS. SMALL: And, just to be very clear, the
5 foundation upon which an opinion is offered or an expert
6 testifies, that is a direct *Daubert* challenge. That deadline
7 was August 18th. That's a preliminary matter.

8 To the extent we're going to have a *Daubert* challenge
9 now and attack the sufficiency or the foundation of
10 Mr. Mueller's opinions --

11 THE COURT: I'm just focused on where is the summary
12 of facts and opinions?

13 MS. SMALL: It's in the disclosure, Your Honor.

14 It's, "Mr. Mueller is going to testify regarding the
15 custom and practices of the financial services industry.?

16 THE COURT: And so where is does he get the next,
17 "and I opine the following"?

18 MS. SMALL: So his specific opinions are not listed
19 in here. It's a summary of the basis of his opinions and a
20 summary of what they will be. That's all that's required for
21 a nonretained expert. It's not an exhaustive requirement,
22 particularly a defendant who's been deposed in this lawsuit,
23 who's been deposed during the investigation. This is a very,
24 very, very late *Daubert* challenge, right?

25 THE COURT: But doesn't Mr. *Daubert* [sic] get to talk

1 about most of this stuff just as a fact witness?

2 MS. SMALL: 100 percent, Your Honor.

3 But this is kind of a -- this was a cautionary
4 measure to say what we didn't want was Mr. Mueller to take the
5 stand, talk about his personal observations and experience
6 under 701, and then get an objection saying this is technical.
7 Now he's talking about the securities industry and raising
8 money and he wasn't disclosed as an expert.

9 So our disclosure is very -- where does it say --
10 "Mr. Mueller is expected to provide relevant factual testimony
11 in this litigation. And to the extent that any such testimony
12 could be characterized as expert opinion, he's being
13 designated as a nonretained expert. He has not been employed
14 to provide expert testimony, and is not a person whose duties
15 regularly involve giving expert testimony."

16 THE COURT: I'm still stuck on where does he say what
17 his opinions are, though? That's where I'm stuck on.

18 MS. SMALL: Well, it describes the subject matter and
19 the categories of his opinions, Your Honor. And again, this
20 is a nonretained expert, but the thoroughness of those
21 disclosures, Your Honor, can't be raised in a motion in
22 limine. Let's think about that. We now have no opportunity
23 to cure that, right?

24 THE COURT: Well, you can ask for a continuance.

25 MS. SMALL: We could, but let's talk about how --

1 THE COURT: You said you never. You don't have. But
2 I'm just telling you, you do.

3 MS. SMALL: Fair enough. But had it occurred as it
4 should have, a motion in limine could have been filed.

5 And by the way, their letter didn't say we need to
6 depose him again. We need to understand this, that, and the
7 other. It just said you need to supplement. It appears from
8 our side we thought they were sufficient, and we didn't.

9 Okay. So had that progressed, maybe we would have
10 supplemented. Had a motion been filed, we could have cured.
11 Had a motion been filed and a hearing been held, a proper
12 *Daubert* hearing, a gatekeeping, we could have called
13 Mr. Mueller to the stand, and we could have fleshed all this
14 out.

15 But to cut us off before the testimony even develops,
16 I think is improper. Let's see how the testimony develops.
17 It might not even be 702. The Court might decide this is
18 purely based on his observations on the ground floor under
19 701, and it's fine.

20 So it's a little bit academic, but I just want to
21 make sure that we're not cutting off or limiting Mr. Mueller's
22 testimony in any way because we didn't disclose it. Does that
23 make sense?

24 THE COURT: Yes.

25 MR. CAMPOAMOR: Your Honor, they are offering him as

1 an expert on the regulation of funds that involved life
2 insurance policies. That's one of the other things, in
3 addition to responding to expert opinions offered by the SEC.
4 We don't know what his opinions are. We don't know the basis.
5 They never provided it. He should not be allowed to opine on
6 them.

7 THE COURT: Yeah. Did you want to say one last word
8 on that or not?

9 MS. SMALL: No, Your Honor.

10 THE COURT: So he needed -- or you-all needed -- or
11 collectively, the actual opinions needed to be provided; they
12 weren't. So Mr. Mueller will be able to testify as a fact
13 witness in this case, but he will not be allowed to testify in
14 any kind of an expert capacity.

15 Number six, character evidence.

16 MS. SMALL: And --

17 THE COURT: Yeah.

18 MS. SMALL: Number six. Yes, Your Honor. I'm sorry.

19 THE COURT: So I'm not sure exactly what we are
20 dealing with here. You don't identify anything.

21 MR. NASSE: Yes, Your Honor.

22 This was a slightly -- you know, prophylactic in
23 nature. I think if you look at some of the witnesses they
24 have identified and the topics they're expected to testify;
25 for instance, Mr. Mueller's brother, his father, his

1 mother-in-law, about his character for good faith.

2 Again, we don't believe that that is relevant or
3 appropriate. We believe that is sort of character evidence
4 that's not permissible under the rule, so I'm not entirely
5 sure whether they intend to offer those witnesses really for
6 those purposes, but that was the genesis of filing this
7 motion, Your Honor.

8 MS. SMALL: Your Honor, I'm also not entirely -- you
9 know, I can't predict what their cross-examination of
10 Mr. Mueller is going to be in their case-in-chief, so it's
11 hard to predict what rehabilitation might be necessary under
12 Rule 608, but I will say that to the extent -- obviously, the
13 Court's aware to the extent that his truthfulness or character
14 for truthfulness is attacked, then we will be offering
15 testimony in response under Rule 608 to rehabilitate him.

16 Rule 608 deals with character evidence for the
17 purpose of attack and rehabilitation. So we have to wait and
18 see what they do with Mr. Mueller before we can offer or
19 decide whether to rehabilitate him under Rule 608 with any
20 kind of reputation or opinion evidence.

21 THE COURT: So have you read that *Wilson* case that
22 came out of the Fifth Circuit in June of this year?

23 MS. SMALL: I have not, Your Honor.

24 THE COURT: So, I mean, there, the Fifth Circuit is
25 saying that in civil cases, character evidence generally does

1 not come in at all. And so what am I supposed to do with
2 that?

3 MS. SMALL: So I -- I have not read that case, but
4 I've read cases similar, and I don't know if the Court there
5 is talking about propensity evidence under 404, because that's
6 a very different analysis.

7 So character evidence can serve two masters, right?
8 It can be used to rehabilitate a witness whose character has
9 been impeached, right? That's Rule 608, and it could also be
10 used for propensity. And 401 says you're not doing that.
11 You're not going there, right? You can't say that because
12 he's been a stand-up, honest, you know, kid and adult, that
13 he's telling the truth today.

14 THE COURT: So then what are the family members going
15 to say?

16 MS. SMALL: So what can be -- they are there for --
17 if his character is attacked -- right? -- they are there to
18 rehabilitate him with opinion and reputation evidence. That
19 comes in under Rule 608, if they attack his character for
20 truthfulness, right? So they are there in case that occurs.

21 But secondly -- so 404 is not an issue, because we're
22 not offering propensity evidence, right? 404 says that's not
23 happening.

24 608, we reserve the right, and that's why those
25 witnesses are listed, because we don't know what they are

1 going to do with Mr. Mueller on cross-examination. We don't
2 know what they are going to say in their opening statement,
3 right? So we'll see if they attack his character, and then we
4 can approach and discuss, you know, where that takes us under
5 Rule 608.

6 But character evidence can also be admissible under
7 401, 402, 403, if it is for some other purpose other than
8 propensity under 404 and other than 608 to rehabilitate a
9 witness. In some cases, that kind of evidence can be shown
10 for scienter, for example. Right? So what Mr. Mueller was
11 doing, how --

12 THE COURT: How would the family know that?

13 MS. SMALL: They were there observing him at the time
14 period, right?

15 THE COURT: They weren't present for any of these
16 conversations or statements, were they?

17 MS. SMALL: I don't think so, but Mr. Divine said in
18 his first motion in limine -- and our motion in limine says
19 we've got to give the jury context. We agree. So what
20 Mr. Mueller was doing, he was going on Disney cruises. The
21 jury, we know, is going to hear that, right? We've also got
22 to hear what else was he doing? What was he saying to his
23 family members? What were they observing, right?

24 THE COURT: How is that relevant to what he was
25 saying to investors? I'm stuck on that.

1 MS. SMALL: Because the jury is now going to hear
2 that the company failed, although they are not going to hear
3 why. They are going to assume that it failed because of the
4 fraud. That's what they are going to assume, since we're not
5 going to be able to tell them why the company failed.

6 But we've got to be able to give them context. We've
7 got to be able to get them get to know Mr. Mueller a little
8 bit and say here's what he was doing at this time. Here's
9 what was going on. Here's what the business plan was. Here's
10 how he intended to get these investors' money.

11 THE COURT: Isn't that sounding like propensity?

12 MS. SMALL: No, not at all, Your Honor. We're not
13 saying that on X date, he told the truth, and so he's telling
14 the truth now. That's not what we're saying. We're not
15 saying he was a Boy Scout growing up, and he swore an oath to
16 tell the truth at Boy Scouts, so he's telling the truth to you
17 here today.

18 We're saying around this time and circumstance, what
19 did the folks in the business, what did folks on the ground
20 floor, what did the folks he was working with observe about
21 him. What did they observe about his intent? They are
22 talking about motive. What did they observe about him? That
23 goes directly to scienter.

24 In fact, the jury charge itself -- I think it's on
25 page 25 of the jury charge. It talks about -- it's

1 instructing the jury on scienter, and it talks about all the
2 facts and circumstances, because there's never going to be
3 direct evidence of -- not never. There's usually not direct
4 evidence of scienter, right?

5 So it's telling the jury -- this is the agreed
6 instruction. You have to consider everything around that time
7 period, all the facts and circumstances that were happening,
8 whether Mr. Mueller is on a Disney cruise or whether he's in
9 the office telling people: We're going to do a great job.
10 We're going to raise this money. We're going to pay the
11 investors back. Everything is going well. All of that kind
12 of thing.

13 What was he telling the lawyers? To the extent that
14 he's telling the lawyers, "Truth is the only option." That's
15 a quote. That's a direct quote. That kind of evidence can be
16 relevant to scienter, and right now, Your Honor, we're just
17 talking about how that kind of character evidence can come in
18 apart from Rule 608, right?

19 So if 608 never happens, if they never impugn his
20 character, we're talking about a different way that this
21 character evidence might come in. It might still come in
22 under 608 depending on what they do on cross-examination.

23 THE COURT: I'm going to hold off ruling on this.
24 I'm going to look at 608, because I've been fixed on 404(a),
25 and under 404(a), the Fifth Circuit's ruling on, this doesn't

1 come in, but I will take another look at 608.

2 MS. SMALL: And I will advise the Court that under
3 608 the Advisory Committee Notes, they also confirm that,
4 quote, "Evidence of misconduct, including corruption" -- and
5 their whole case is about embezzlement -- right? -- that
6 Mr. Mueller took all the investors' money -- "that that can
7 open the door for opinion and reputation evidence under Rule
8 608."

9 THE COURT: I'll look at --

10 MS. SMALL: That's the Advisory Committee Note on
11 Subsection A to Rule 608.

12 The cases -- the government actually cites the *Renda*
13 *v. King* in the Third Circuit and the *U.S. v. Dring*, D-R-I-N-G,
14 in the Ninth Circuit, both of these cases address these
15 topics. Once you attack the character, and an attack on
16 character is accusing someone of fraud, embezzlement,
17 corruption, those all open the door to this kind of evidence
18 under 608.

19 MR. NASSE: Your Honor, I know you're going to take
20 this under advisement, but I just want to address that last
21 point.

22 The cases she cited clearly go directly contrary to
23 what the counsel has just stated. They state a case --
24 particularly on fraud, us going through how Mr. Mueller lied
25 or made misrepresentations to investors does not impute his

1 character for truthfulness in general.

2 Now, if we were to say, he is a liar and has lied
3 throughout his life; therefore, he lied in these instances,
4 that would be opening the door. But in cases of fraud, in
5 particular, the courts have been pretty uniform that vigorous
6 cross-examination of whether he told the truth in a particular
7 instance as relevant to the claims in this case, does not open
8 the door to this kind of character evidence, Your Honor.

9 MS. SMALL: And, Your Honor, I agree with Mr. Nasse.

10 That is what the cases say, but they go one step
11 further, and they talk about the difference between a direct
12 attack on a witness's credibility. That's impeachment.
13 That's a prior inconsistent statement. That's bias, right?
14 You have an interest in the outcome of this litigation.
15 Impeaching him with deposition testimony or testing his
16 veracity about the statements at issue in this case.

17 I agree that doesn't open the door, but it does say,
18 in particular in the 1983 case, the Section 1983, the *Bivens*
19 case, in *Renda v. King*, all it took there for the door to be
20 opened -- it was a 1983 case, and the defense -- the
21 plaintiff's counsel argued in opening statement that the
22 police officer abused his role and committed misconduct.

23 And the Court said, "By saying he abused his role and
24 committed misconduct in his official scope as a police
25 officer, that was enough to trigger the corruption exception

1 under 608, and all of that good character evidence under 608
2 should come in."

3 They found error in that case. So I do agree with
4 Mr. Nasse. They are saying, yes, of course they are going to
5 ask him: You lied in the PPM. This wasn't true. You told
6 investors this.

7 That goes to the veracity of his statements at issue
8 in this case. And I agree with him. The cases are very clear
9 that doesn't open the door, but they go one step further. The
10 complaint is littered with allegations regarding embezzlement.

11 They say that "you raided the piggy bank," and I
12 encourage you to look at Footnote 3 and the *Dring* case and
13 also that Third Circuit case that the SEC cites, and we'll see
14 how the arguments and the questioning play out, but I do think
15 there's an opportunity here that the door will be opened under
16 Rule 608.

17 And as I mentioned, some of this evidence could be
18 relevant to scienter as well.

19 THE COURT: Okay. Seven and eight, questioning
20 regarding how the SEC did its investigations. That's granted.

21 Number nine, Scott Allen resignation memorandum.

22 MR. DIVINE: Good morning, Your Honor. Charlie
23 Divine on behalf of the SEC.

24 Your Honor, we made two arguments, and this started
25 with the defendants' objections to the SEC summary judgment

1 evidence. They objected to the Scott Allen memo on several
2 grounds. One, that it's hearsay; two, that it calls for an
3 improper legal opinion; and three, that it lacks foundation.

4 And so we laid out our case in the brief. We think
5 it both meets the hearsay exception for a business record.
6 And even if it doesn't, it can be admitted not for the truth
7 of the matter asserted, but as a notice to Mr. Mueller of all
8 the concerns Mr. Allen pointed out in the memo about
9 Mr. Mueller's conduct with respect to the business.

10 THE COURT: So let's focus on the hearsay, because
11 it's obviously a business record.

12 So to the defendant, why doesn't it come in with a
13 limiting instruction to the jury?

14 MR. DAVIS: It might, Judge. The statement in this
15 memo about Ponzi, the witness recanted that during his
16 deposition. In fact, on the face of the letter itself, he
17 says, look, I'm not alleging you did anything wrong. It just
18 kind of feels like a Ponzi. So that is the language that is
19 under 403 should not be thrown into the jury box.

20 This witness testified that, no, I don't believe that
21 Robert Mueller was involved in a Ponzi scheme or did anything
22 inappropriate. You're going to hear the evidence from these
23 witnesses, Judge.

24 These guys were actually the ones in direct contact
25 with the investors. Testified that they never said anything

1 false or misleading to any investors. They don't have any
2 knowledge that that has been done by anyone. In fact, the
3 bold, underlined portion of this -- and I don't know if the
4 Court has a copy of the memo.

5 May I approach, Your Honor?

6 THE COURT: I have a copy.

7 MR. DAVIS: May I approach, Your Honor?

8 THE COURT: Yeah.

9 MR. DAVIS: So we're really talking about the content
10 about whether some of these statements should be thrown into
11 the jury box. Particularly when Mr. Allen, when deposed, you
12 know, basically said what you see here, Your Honor, on the
13 face of this exhibit bold and underlined, "I'm not making any
14 accusations towards you or anyone else," and, quote, "Do not
15 know of anything that would confirm that scenario."

16 The evidence will show that a couple of these fellows
17 didn't get the raises they wanted, because they weren't
18 raising money. And we were talking about a pandemic. We were
19 talking about all these global downturns, and so that they
20 left. And so this fellow recanted that.

21 So the question is, should this be thrown in there,
22 that you have a former employee, you know, saying it feels
23 like a Ponzi scheme, when he's, not only on the face of this
24 exhibit, but also in his deposition, saying, number one, I
25 don't have knowledge to say that; number two, I don't believe

1 it happened.

2 THE COURT: So is Allen going to be a witness in this
3 case?

4 MR. DAVIS: Yes, sir.

5 THE COURT: So then why can't we just ask him the
6 questions and avoid the memo?

7 MR. DAVIS: That's fine with us, Judge.

8 MR. DIVINE: Your Honor, the only thing that I would
9 like to address -- just quickly -- is with respect to
10 Mr. Allen, I don't think that he recanted his testimony at
11 all -- or recanted the memo at all in his deposition.

12 What he said is exactly what's in the memo. And he
13 said that he didn't have any evidence that it was a Ponzi
14 scheme, but it sure looked and felt like it to him. And him
15 telling that to Mr. Mueller, I think, is notice to
16 Mr. Mueller.

17 The other thing that's --

18 THE COURT: Yes. So my whole point is there's an
19 easy way of doing things and a hard way of doing things, so
20 the easiest way is just asking him at the witness stand these
21 things, that way I don't get in trouble with admitting what
22 may be a hearsay statement.

23 MR. DIVINE: And would Your Honor consider redacting
24 that portion so that we can talk about the rest of the memo,
25 because there's also other concerns raised in the memo about

1 how the business is functioning and some of the internal
2 controls and processes at the business, which were
3 important -- are important to the SEC's theory of the case.

4 THE COURT: So right now it is a business record, but
5 it does contain hearsay, so that's a problem for you-all. You
6 can cure it by just having Mr. Allen answer questions
7 directly, or you can cure it by conversing with the other side
8 and see what other redactions you-all can enter into and get
9 an agreement that it comes in that way.

10 That's the ruling on that one.

11 Number ten, Mr. Mueller's prior invocation of the
12 Fifth.

13 MR. CAMPOAMOR: Good morning, Your Honor. Fernando
14 Campoamor for the SEC.

15 Yes, Your Honor, we wanted to raise this issue now,
16 because we want to obviously avoid this coming up at trial.

17 And part of the reason is we don't know, although we
18 suspect we know, what Mr. Mueller is going to say now, to
19 those -- in answer to those questions; that is, he previously
20 took the Fifth on essentially all questions that had to do
21 with whether he used investors' monies, investor funds to pay
22 for personal expenses.

23 Based on what they filed in their motion for summary
24 judgment, it looks like Mr. Mueller is not going to say that
25 he thought that was fine; that he had reasons to believe that

1 that was fine, maybe because he talked to Mr. Concilla or
2 maybe because he consulted with accountants; I'm not exactly
3 sure, but he appears to be one to do that.

4 And to us, it appears completely inconsistent with
5 what seems to be an after-the-fact explanation for why he used
6 the funds this way when, before, he clearly personally had
7 that fear and concern that it would incriminate him if he
8 answered. And so we thought it would be inconsistent and
9 therefore improper impeachment if he now offers an explanation
10 to those questions.

11 THE COURT: So it's now kind of unduly prejudicial to
12 have the Fifth Amendment being thrown out there. You can
13 achieve the same result by asking him these questions instead
14 of telling him, "Well, you refused to answer; isn't that
15 correct?"

16 MR. CAMPOAMOR: So, yes, and we can certainly answer
17 it, and -- but is the Court suggesting that we do not mention
18 the Fifth and just say "You previously refused to answer that
19 question?"

20 THE COURT: Yeah, the 403 balancing factors here seem
21 to indicate that throwing out the Fifth is pretty harsh.

22 MR. CAMPOAMOR: And that's why we wanted to raise it
23 and discuss it. So is the Court saying that we would be
24 allowed to at least say, "Mr. Mueller, you previously refused
25 to answer those questions"?

1 THE COURT: Yes.

2 MR. CAMPOAMOR: Okay.

3 THE COURT: You just omit --

4 MR. CAMPOAMOR: The Fifth.

5 THE COURT: -- the Fifth.

6 MR. CAMPOAMOR: Okay. Understood. Thank you.

7 THE COURT: Okay. I think we've gotten through all
8 the motions. I've got to get on a call here in a couple
9 minutes.

10 So you are asking for ten days. I can give you nine.
11 I'm having to move a criminal trial if this case is going
12 forward, because I had a criminal trial the second week. It
13 sounds like we're still going to trial.

14 I mean, is there any money to secure out of
15 Mr. Mueller?

16 MR. DAVIS: The answer, Judge, is --

17 THE COURT: Well, he's still paying you, so...

18 MR. DAVIS: Well, I could approach and tell you about
19 that statement, Judge. He's got relatives that don't like
20 what the SEC is doing and helping, but --

21 So is there any money to be had from Mr. Mueller?
22 The answer is no. And we've had -- we won't get into the
23 extensive discussions, the substance of it --

24 THE COURT: I'm not going to get there either. I
25 just want to make sure we've fully explored everything and why

1 we are doing something, because otherwise I'm moving a lot of
2 things around to fit you in. So if it has to be tried, it has
3 to be tried, but I don't want to be surprised here that this
4 one goes away, and I've imposed on one of my colleagues to
5 take a criminal case for me that didn't need to occur.

6 MR. DAVIS: Washington wants a pound of flesh, not
7 these gentlemen -- and gentle-ladies, but the answer is no,
8 and you'll hear that through his testimony. I'm not doing
9 anything but forecasting kind of the reality of it. He's also
10 basically unemployable, given this.

11 I will say, Judge, that we are set -- we are going to
12 file a motion if this case is proceeding. I'm set on
13 December 8th in Judge Hanks' court in Houston on a docket
14 call, final pretrial, that actually Ms. Small and I are both
15 on. So if that happens, maybe one of us won't be here that
16 day, if we have to go cover that. It's a civil RICO case.

17 THE COURT: And just mention that you are set over
18 here. I saw Judge George Hanks just the other day, so I'm
19 sure he'll -- if it's just something minor, I'm sure he'll
20 reschedule for you.

21 MR. DAVIS: Yes, Your Honor.

22 And Judge Crane did the same for this case. I
23 thanked him for that. We were set, and he understood that we
24 were set here.

25 So we are going to visit, Judge -- we'll continue --

1 as in all cases, we will continue to see if we can get a
2 solution. It's difficult.

3 THE COURT: Pare down the witness list as much as you
4 can, because I'm not sure a jury is going to want to hear this
5 for nine days, but...

6 MR. DAVIS: I don't think it will go the full days,
7 but that -- you can hold me to that, Judge, on our side.
8 Judge, I don't know if we are going to visit about the time or
9 openings or for voir dire?

10 THE COURT: Yeah. Thank you for that.

11 How much time do you want for voir dire? I normally
12 give 30 to 45 minutes each side.

13 MR. DAVIS: Well, then I would ask for 45 minutes,
14 Judge, for voir dire. 30 minutes for opening from our side.

15 MR. DIVINE: Your Honor, that's fine. 30 minutes is
16 fine for voir dire and 25 to 30 minutes for our opening, Your
17 Honor.

18 THE COURT: It's 45 for voir dire and 30 for opening.
19 Both sides.

20 So the way I do voir dire, you can ask individually
21 one by one. You can ask questions of the panel as a whole.
22 I'll ask all the general questions in advance, and based upon
23 some of the questions you've submitted to me before, whatever
24 I don't ask, you can ask the panel. Some are more slanted to
25 one side or the other. I try to avoid myself posing those

1 questions to the jury panel, so you will be able to do so,
2 though.

3 MR. DAVIS: Judge, will it be six plus two
4 alternates, or --

5 THE COURT: Yeah, we better have two alternates here.

6 MR. DIVINE: How many strikes do you typically allow?

7 THE COURT: I'm sorry?

8 MR. DIVINE: How many strikes do you typically allow?

9 THE COURT: For a six-person, it's -- God, I've
10 already forgotten now.

11 MR. DIVINE: Three, Your Honor?

12 THE COURT: Well, let me put it this way.

13 I'm going to answer my own question just because I'm
14 doing the jury excuses right now. Everybody wants to be
15 excused. So the number of strikes will be dependent upon how
16 many people show up in this room, and so it's not looking
17 good. I'll tell you that. I'm astounded by the number of
18 people who want out either because -- apparently anxiety is
19 the new excuse for jury duty. So mental health problems are
20 galore.

21 So that's a long way of saying I don't know until the
22 day. Assuming we have a number of people show up, then I will
23 provide ample number of strikes. If we're going to barely
24 meet it, well, we'll see.

25 MR. DAVIS: Yes, sir. Judge, will we get the cards

1 that morning?

2 THE COURT: You'll get them that morning.

3 Anything else?

4 MR. DIVINE: Your Honor, we had several housekeeping
5 matters. I know that you're out of time. One that I really
6 want to make sure we get in front of the Court is potential
7 remote testimony. There are three witnesses at issue here.
8 Mr. Concilla, who both parties have agreed to allow to testify
9 remotely, if Your Honor is amenable.

10 THE COURT: That's fine.

11 MR. DIVINE: Okay. Then there's Mr. Federico, who is
12 the other attorney. He is on vacation in Colorado and has
13 asked to testify remotely. Both parties agree to allow him to
14 testify remotely, but the defendant -- and I'll let them
15 correct me if I'm wrong. I'm just trying to get in front of
16 Your Honor, the defendant would like to also play his
17 deposition designations if he testifies remotely.

18 THE COURT: No. We're only going to hear it once.

19 MR. DAVIS: Judge, I'll -- we'll use them to impeach
20 him if he testifies differently, we've preserved our argument.
21 I think we'll argue about why it should be admitted, not only
22 for impeachment, but for substantive, given he was sworn and
23 both parties were present.

24 THE COURT: You should be prepared to ask him all the
25 questions you intend to ask him when he's appearing remotely.

1 MR. DAVIS: We agree with that, Judge. And there's
2 one other witness.

3 THE COURT: You have a witness?

4 MR. DAVIS: Spradlin.

5 MR. DIVINE: Yes, Mr. Spradlin is another one of the
6 business development people. I'll let them present
7 Mr. Spradlin.

8 MR. DAVIS: Consistent with the Court's order on
9 getting the people here live, we subpoenaed him. Got a call
10 from the lawyer, a letter from a lawyer saying that he's going
11 to be out. He's an important witness. You know, in order to
12 keep things moving, we don't mind him being remote if we have
13 to.

14 He has been deposed. He'll be an important witness.
15 We just didn't know if the Court -- he probably doesn't have
16 the legal unavailability argument, Judge, if we pushed it, but
17 if he can appear remotely, and apparently they are offering
18 that, we don't oppose that, Judge.

19 THE COURT: If you both agree to remote, that's fine
20 with me.

21 MR. DIVINE: Yes, Your Honor. We both agree to
22 remote.

23 MR. DAVIS: We don't want to make him too mad if he's
24 here, Judge, in person.

25 MR. DIVINE: Your Honor, so your courtroom fact,

1 we've reviewed it as carefully as we can. It doesn't look
2 like to us you typically require the parties to exchange
3 opening presentations. We plan to use a PowerPoint.

4 We also --

5 THE COURT: I don't require it, but I encourage you
6 both to -- if you're going to use PowerPoints for opening,
7 exchange them only to avoid what may come up to be an
8 objection that stops us.

9 MR. DIVINE: Yes. So that was what I wanted to raise
10 is we think that, you know, it's a fairly complex case. There
11 are some things that we plan to explain a little bit in an
12 opening, like, the preponderance standard, what an investment
13 fund is, and I think it's going to come up what a Ponzi scheme
14 is. It's short explanations. That was one thing we wanted to
15 flag for the Court.

16 THE COURT: So, again, exchange -- if there's going
17 to be an objection to that, try to work it out. If not, call
18 us up, and we'll intervene.

19 If you are using a definition of a Ponzi scheme that
20 comes from a Fifth Circuit or U.S. Supreme Court case, I'll
21 allow that.

22 MR. DIVINE: And then --

23 MR. DAVIS: Judge, we object to that, but we'll raise
24 it at the time. If they give us the PowerPoint. We can do it
25 on Monday.

1 MR. DIVINE: And then two logistic points.

2 So we have -- we plan to deliver to Your Honor's
3 chambers what amounts to, I think, 16 binders of exhibits
4 labeled 1 through 380. And we have a separate set also that
5 we would plan to use for witnesses, if that is your
6 preference.

7 THE COURT: Let's keep it just to one set. And if I
8 need the binders, I'll take them from the witnesses after
9 trial.

10 MR. DIVINE: Okay. Because the other thing I was
11 going to suggest is then we plan to come to Court with a
12 separate set for each witness and say, okay, here's your tiny
13 pile of actual exhibits that you need to look at.

14 THE COURT: So let's just do the one set. I'm
15 anticipating that whatever the jury does, it will be the
16 inevitable motions for summary judgment as a matter of law,
17 post-verdict, so I'll probably need the exhibits, because this
18 case ain't going away anytime soon.

19 MR. DAVIS: Do you want -- I guess we can bring a
20 copy of ours, and I guess the SEC will bring a copy of theirs?
21 Just to have, like, at least just one binder?

22 THE COURT: So I always want you guys to bring one
23 set of binders, because as big of a fan of technology I am,
24 you have to plan for failure.

25 MR. DAVIS: Yes, sir. But everything during trial

1 but for technological glitches, we'll all be technological?

2 THE COURT: Will all be via the monitors, yes.

3 MR. DAVIS: Excellent.

4 MR. DIVINE: Your Honor, do you have any objection,
5 at least for certain exhibits like a PPM, which is an 18-page
6 legal document, having a witness have a hard copy that they
7 can flip through, and that they can look at it?

8 THE COURT: Yes, that's fine.

9 MR. DIVINE: Okay.

10 I'm looking through my list to make sure I've got
11 everything. My colleagues are going to tell me I forgot the
12 one that thought was the most important.

13 MR. DAVIS: Well --

14 MR. DIVINE: Do you have something?

15 MR. DAVIS: No. I was going to say while he's
16 looking, Judge, I just want to get clarity on the Pinball
17 ruling, because it came back up with Mr. Rushforth.

18 So we can talk about Pinball. We just can't get into
19 the details. Certainly can't get into technology, but we can
20 describe that it existed, it had employees, like, more of a
21 general description?

22 THE COURT: That's correct. But then I'm not going
23 to let you go into the marketing plans, the financials, any of
24 that stuff.

25 MR. DAVIS: Okay. We'll take that up, Judge, and

1 reurge it. I know that's a ruling on the limine. So we won't
2 get into the financials, but we'll get into, like, the general
3 business description.

4 And as I understand it, we've withdrawn our
5 stipulation or our agreement upon the fact of the business
6 failing and that investors lost money. Is that going to be
7 allowed just for direction of opening?

8 THE COURT: You can say the business is no longer in
9 operation or the business failed, period, but not because the
10 SEC were such bad guys or because of this complaint that they
11 lodged against us. You can't do that second step.

12 MR. DAVIS: Currently, unless the evidence later
13 brings it up? So we can talk about economic factors, not the
14 SEC being part of the causation?

15 THE COURT: That's fine.

16 MR. DIVINE: On that same vein, is it okay to say
17 that the businesses went into bankruptcy?

18 THE COURT: I thought you had a stipulation to that.

19 MR. DAVIS: We did when we were -- when we thought we
20 were going to be able to counter why. We can confer, Judge.
21 We've been able to confer on almost everything, Judge.

22 THE COURT: I'm ten minutes late.

23 Let's -- what else?

24 MR. DIVINE: That's a lot of pressure, Your Honor.

25 All right. Last thing. We plan to ask this Court to

1 exclude all of the witnesses pursuant to Federal Rule of
2 Evidence 615, with one exception, which would be our expert
3 Mr. Post, and ask him to be able to watch the testimony.

4 THE COURT: Experts are excused from the rule.

5 MR. DIVINE: I believe that's all we have, Your
6 Honor. Thank you for your patience.

7 MR. DAVIS: That's it, Judge. Thank you.

8 THE COURT: We'll see you-all.

9 -o0o-

10 I certify that the foregoing is a correct transcript from
11 the record of proceedings in the above-entitled matter. I
12 further certify that the transcript fees and format comply
13 with those prescribed by the Court and the Judicial Conference
14 of the United States.

15

16 Date: 12/04/23

/s/ *Gigi Simcox*
United States Court Reporter
262 West Nueve Street
San Antonio TX 78207
Telephone: (210) 244-5037

19

20

21

22

23

24

25